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No. 92-401

In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

THOMAS OSES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court and the United States Court of Appeals for the First Circuit correctly concluded, on the basis of their review of the state appellate record, that respondent had exhausted state remedies as to the federal constitutional claims presented in his petition for a writ of habeas corpus.

2. Whether the District Court and the United States Court of Appeals for the First Circuit properly determined, based upon substantial evidence in the record, that the conduct of respondent's state trial deprived him of his Sixth Amendment right to represent himself.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Thomas Oses respectfully requests this Court deny the Commonwealth's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On October 7, 1991, the United States District Court for the District of Massachusetts (Woodlock, J.) granted Thomas Oses' petition for a writ of habeas corpus, finding his Massachusetts Superior Court trial to have been conducted in a manner that thwarted any meaningful

exercise of his Sixth Amendment right to represent himself. Appendix B:30-81.[1]

The district court based this conclusion on its findings that the trial judge: (1) unjustifiably excluded Mr. Oses from bench and lobby conferences, Appendix B:57-61; (2) abdicated his responsibility for exercising oversight over the imposition physical restraints, including manacles, leg-irons and a gag, on the *pro se* defendant in front of the jury, Appendix B:62-69; and (3) made repetitive demeaning and derogatory comments in front of the jury ridiculing Mr. Oses' efforts at presenting his defense, Appendix B:69-78. The district court also found that the prosecutor improperly denigrated Mr. Oses and his *pro se* defense. Appendix B:78-80. The pervasive violation of Mr. Oses' Sixth Amendment rights compelled the district court to grant Mr. Oses' petition for a writ of habeas corpus. The court of appeals, "[a]fter a careful examination of the record," upheld the district court's findings of fact, substantially adopted its conclusions and affirmed its decision. Appendix A:5-9. The Commonwealth now seeks review of that decision in this Court.

Prior Proceedings

After a twenty-three day jury trial, on July 8, 1977, Thomas Oses and co-defendant William Sheppard were

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[1] The Appendix to the Commonwealth's Petition for a Writ of Certiorari is cited by letter and, where appropriate, by page (*e.g.*, Appendix A:3). The transcripts of state court proceedings are cited by volume number and page (*e.g.*, Tr. II:3).

found guilty of armed assault in a dwelling and kidnapping. Mr. Oses' direct appeal, in which he argued among other things that his Sixth Amendment right to represent himself had been violated, did not reach the Massachusetts Appeals Court until 1988.[2] The Massachusetts Appeals Court affirmed his convictions in an unpublished Memorandum and Order. Appendix C. Mr. Oses sought further appellate review on all issues from the Massachusetts Supreme Judicial Court, but his application was denied on February 1, 1989. 404 Mass. 1101 (1989).

Proceeding *pro se*, Mr. Oses filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 3, 1989 and, shortly thereafter, the district court appointed counsel to assist him. Both parties submitted memoranda and the district court heard argument in October, 1989. On October 7, 1991, the district court granted the petition, issuing a fifty-seven page memorandum opinion. Appendix B. The Commonwealth appealed, and on April 15, 1992, the Court of Appeals for the First Circuit affirmed the district court's decision. Appendix A. The Commonwealth's petition for rehearing and rehearing *en banc* was denied on June 1, 1992. Appendix D. The Commonwealth filed this Petition for a Writ of Certiorari ("Commonwealth's Petition") on August 31, 1992.

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[2] Mr. Oses claimed an appeal on July 19, 1977. The reason for the extraordinary delay is not apparent from the record and is not at issue in this proceeding. The procedural chronology is set forth in the district court's opinion. Appendix B:19-20 n.9. The court of appeals noted that it was "clear" that the delay was not the fault of Mr. Oses. Appendix A:11.

Facts

The relevant facts are described at length in the district court's comprehensive opinion and are briefly summarized in the court of appeals' *per curiam* decision. The district court and the court of appeals found that three sets of errors occurring at Mr. Oses' trial violated his Sixth Amendment right to represent himself – the trial judge's unjustifiable exclusion of Mr. Oses from bench and lobby conferences; the imposition on the *pro se* defendant of various physical restraints, in front of the jury, without "any oversight whatever" by the trial judge and without inquiry into less restrictive measures; and the trial judge's and the prosecutor's sarcastic, demeaning the prejudicial comments directed at Mr. Oses and his *pro se* defense. Appendix B:30-81; Appendix A:5-8.

REASONS FOR DENYING THE WRIT

The *per curiam* decision of the court of appeals, and the thorough and careful decision of the district court that it affirms, apply established precedent of this Court to the facts of this case. The lower courts resolved no novel issues. The decisions below are fully consistent with this Court's decisions and with existing precedent both in the First Circuit and the other federal courts of appeals. The Commonwealth has pointed to no "special and important reasons" favoring review, and none of the considerations set forth in Supreme Court Rule 10 are implicated.

The essence of the Commonwealth's Petition is a disagreement with the factual determinations upon which

the court of appeals and district court decisions are based. The bulk of the Commonwealth's Petition is devoted to rearguing its version of the facts. Those facts were resolved against it, first by the district court and again "after a careful examination of the record" by the court of appeals.[3] Those factual determinations are amply supported by substantial evidence in this voluminous record. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"). Therefore, the Commonwealth's Petition should be denied.

I. THE COURTS BELOW CORRECTLY CONCLUDED, ON THE BASIS OF THEIR REVIEW OF THE STATE APPELLATE RECORD, THAT RESPONDENT HAD EXHAUSTED STATE REMEDIES AS TO THE FEDERAL CONSTITUTIONAL CLAIMS PRESENTED IN HIS PETITION FOR A WRIT OF HABEAS CORPUS.

After careful review of the state appellate record, the district court found that "the state courts were accorded a

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[3] To examine but one example, the Commonwealth makes the factual assertion that although Mr. Oses was excluded from bench and lobby conferences, he was provided with a "transcript of everything that occurred" during such conferences. Commonwealth's Petition at 8. This is simply not true. The court of appeals identified over *seventy* such conferences. Appendix A:6. The transcripts in the record that were actually provided to Mr. Oses at trial (more than two weeks after the commencement of the trial) reflect but a small fraction of that number. Tr. XII:18-19.

fair opportunity to confront the substance of Oses' federal claims" and therefore that Mr. Oses had satisfied the exhaustion requirement of 28 U.S.C. § 2254. Appendix B:29. The court of appeals affirmed "substantially for the reasons set out on [sic] the district court's thorough opinion. . . . " Appendix A:5.

The courts below made no errors of law, nor were they called upon to rule on any novel issues in reaching this conclusion. Their decisions reflect only the application of settled principles of law to the facts found by the district court. The district court correctly recognized the governing principle that the exhaustion doctrine is satisfied " 'once [the] federal claim has been fairly presented to the state courts.' *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (*quoting Picard v. Connor*, 404 U.S. 270, 275 (1971))." Appendix B:26. Furthermore, the district court understood that a claim must have been presented to the highest court of the state in order for exhaustion to be found. Appendix B:25, *citing Mele v. Fitchburg Dist. Court*, 850 F.2d 817, 819 (1st Cir. 1988), *rev'd on other grounds*, 884 F.2d 5 (1st Cir. 1989).

The Commonwealth's suggestion in its Petition that the lower courts "improperly relaxed" existing exhaustion requirements does not fairly characterize either the decisions of the lower courts or the facts as found by those courts. Based on a careful review of the state appellate record, including Mr. Oses' brief to the Massachusetts Appeals Court, the Appeals Court's opinion, and Mr. Oses' Application for Further Appellate Review, the courts below correctly determined that Mr. Oses' claim of a violation of his Sixth Amendment right to represent himself was fairly presented to the Massachusetts

Appeals Court and Supreme Judicial Court and that the exhaustion requirement therefore was fully satisfied.

The district court found that although Mr. Oses did not rely "exclusively on a claim of denial of self-representation under *Faretta v. California*, 422 U.S. 806 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168 (1984) . . . that is essentially what he argued to the [Massachusetts] Appeals Court on pages 26-27 of his brief to that court. . . . " The district court then quoted at length from Mr. Oses' brief to the Massachusetts Appeals Court. Appendix B:31-32. The district court concluded that the "effect of these arguments by Oses, including his reliance on the precise federal constitutional precedent on point, was to alert the state court to the federal nature of his claims. . . . " Appendix B:33.

The district court then observed that the Massachusetts Appeals Court plainly recognized the federal quality of the claim as the state court discussed each of the circumstances Mr. Oses relied upon "at length" in light of applicable federal constitutional law. Appendix B:33-34 and n.13. There can be no doubt that the district court was correct – the Massachusetts Appeals Court devoted *eight pages* of its opinion to a discussion of Mr. Oses' Sixth Amendment self-representation claim. Appendix C:13-27. The Massachusetts Appeals Court focussed specifically on this court's decisions in *Faretta v. California*, 422 U.S. 806 (1975), and *McKaskle v. Wiggins*, 465 U.S. 168 (1984), in light of specific aspects of the conduct of the trial: exclusion from conferences (Appendix C:18-19); physical restraints (Appendix C:19-21); and improper and derogatory comments by the trial judge and the prosecutor (Appendix C:21-22).

The district court then reviewed Mr. Oses' application for further appellate review to the Massachusetts Supreme Judicial Court ("SJC"), finding that every issue Mr. Oses presented to the Appeals Court was presented to the SJC as well,[4] including his claim that his right to represent himself had been violated. The district court stated:

> In his application to the SJC for Further Appellate Review, Mr. Oses presented the identical list of claimed violations of his rights. He engaged in the same factual discussion of each of the four factors he believed deprived him of his ability to represent himself properly in the eyes of the jury. *See* Defendant's Further Appellate Brief at 9-13. As with the Appeals Court, the SJC received sufficient notice from the Application for Further Appellate Review. *See Mele*, 850 F.2d at 820-821.

Appendix B:36 n.14.[5] Accordingly, the district court properly concluded that Mr. Oses had exhausted state

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[4] The eight "Questions Presented" to the SJC in Mr. Oses' Application for Further Appellate Review were taken almost verbatim from the eight "Questions Presented" in his brief to the Massachusetts Appeals Court.

[5] The very purpose of the Massachusetts practice of appending the Appeals Court opinion to an Application for Further Appellate Review is so that the SJC may weigh the applicant's arguments on the issues listed in the Application against the Appeals Court's rationale on those issues. *Mele*, 850 F.2d at 822. As Mr. Oses raised every issue to the SJC that had been argued to the Appeals Court, the SJC considered the entire Appeals Court opinion, including the extensive discussion of the claimed violation of his Sixth Amendment right to represent himself.

remedies with respect to the Sixth Amendment claim, and the court of appeals properly affirmed that decision.

II. THE COURTS BELOW PROPERLY DETERMINED, BASED UPON SUBSTANTIAL EVIDENCE IN THE RECORD, THAT THE CONDUCT OF RESPONDENT'S STATE TRIAL DEPRIVED HIM OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF.

The Sixth Amendment confers on a defendant the right to *personally* conduct his own defense. *Faretta v. California*, 422 U.S. 806, 819 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984). Although a court is permitted to appoint stand-by counsel "to aid the accused *if and when the accused requests help*," *Faretta v. California*, 422 U.S. at 834 n.46 (emphasis supplied), it is fundamental to that right that the court may not supplant a defendant who elects to represent himself with a lawyer he does not want:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Id., at 820.

The right to appear *pro se* and present one's own defense in one's own words affirms the dignity and autonomy of the accused. *McKaskle v. Wiggins*, 465 U.S. at 176-177. As this Court has observed: "From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself." *McKaskle*, 465 U.S. at 179. The right to proceed *pro se* is undermined by conduct that tends to destroy the jury's perception that the defendant is in fact representing himself. *McKaskle*, 465 U.S. at 177. It is also undermined by conduct, be it on the part of the trial judge, the prosecutor or stand-by counsel, that ridicules, demeans or diminishes the *pro se* defendant's efforts in the eyes of the jury. In this case, the district court and the court of appeals properly concluded that the conduct of Mr. Oses' trial effectively frustrated Mr. Oses' attempt to defend himself, depriving him of his Sixth Amendment rights.

The factual underpinnings of the district court and court of appeals decisions may not be disregarded absent clear error. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). The district court kept Mr. Oses' petition under advisement for two years, during which time the court carefully and thoroughly reviewed more than thirty volumes of pretrial and trial transcripts. Indeed, the district court judge wrote that he "read and reread this record . . . to 'relive the whole trial imaginatively.' " Appendix B:101. Based on that review, the district court found numerous instances of misconduct and prejudicial error that eviscerated Mr. Oses' efforts to exercise his Sixth Amendment right to represent himself. The court of appeals, "[a]fter a careful examination of the record [upheld] the district court's findings of fact. . . . " Appendix A:9 (footnote

omitted). These factual findings cannot now be disregarded, and they provide ample, indeed, overwhelming justification for denying this Petition.

A. The exclusion of Mr. Oses from bench and lobby conferences interfered with his right to represent himself.

At the outset of trial Mr. Oses moved to be permitted to participate in bench and lobby conferences. The trial judge denied this motion, stating that he did not intend to have any such conferences. Contrary to his assurance, however, the trial judge in fact held more than *seventy* such conferences, outside of Mr. Oses' presence, throughout the course of the trial. From the very first such conference, vital trial issues – including the adequacy and make-up of the jury, evidentiary issues, security matters, identification of witnesses, the relationship between stand-by counsel and defendants and their ability to represent themselves – were discussed, in private, by the trial judge, the prosecutor and stand-by counsel. Appendix A:6; Appendix B:57-61.

As a result, Mr. Oses was denied the opportunity to speak in his own defense on the issues discussed at the bench and lobby conferences. To this extent, Mr. Oses was completely supplanted by standby counsel whom he had explicitly rejected and clearly did not trust. In addition, Mr. Oses was denied the right to be perceived as defending himself before the jury at the bench conferences. *See McKaskle v. Wiggins*, 465 U.S. at 184. Lastly, the exclusion of Mr. Oses from these conferences created a situation in which the trial judge's frequent demeaning and sarcastic

criticisms of Mr. Oses inevitably occurred in the presence of the jury, further eroding Mr. Oses' effort to represent himself.

McKaskle explicitly precludes the imposition of stand-by counsel as a replacement for a defendant who wishes to represent himself. "[T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel . . . to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded." *McKaskle v. Wiggins*, 465 U.S. at 178.

In this case, contrary to the mandate of *McKaskle*, the judge not only permitted stand-by counsel to control certain aspects of Mr. Oses' defense, but he actually *excluded* Mr. Oses from participation on these matters, without even an inquiry as to whether Mr. Oses would be disruptive or dangerous at such conferences. Although a judge may terminate self-representation upon findings that the defendant deliberately engages in serious and obstructionist misconduct, *Illinois v. Allen*, 397 U.S. 337, 343 (1970), the judge in this case made no such findings before he decided categorically to exclude Mr. Oses from these conferences. Indeed, prior to and at the time the trial judge excluded Mr. Oses from such conferences, the record reveals no conduct by Mr. Oses that could fairly justify this exclusion.

Moreover, there was no attempt on the part of the court to even investigate, much less adopt, any less drastic alternative. "Where constitutional rights of the accused are at stake, including the right to be present, a

trial court must look for corrective measures that do least injury to these rights consistent with the preservation of an orderly court atmosphere." *Badger v. Cardwell*, 587 F.2d 968, 975 (9th Cir. 1978) (reversible error to expel *pro se* defendant for mere interruptions and argumentativeness).

B. The imposition of physical restraints on Mr. Oses in front of the jury interfered with his right to represent himself.

On various occasions, in the presence of the jury, Mr. Oses was shackled with leg irons or wrist manacles and gagged. From the beginning of the trial the trial judge completely abdicated his responsibility for exercising any oversight over the security methods employed. Appendix A:7; Appendix B:62-69. For example, as the district court found the trial judge's decision to impose a gag on the defendant was "not a measure of last resort, but an expedient. . . . " Appendix B:67. The judge conducted no inquiry and made no attempt to devise any less restrictive means of insuring security that would have been more consistent with Mr. Oses' fundamental right to present his own defense. *Compare Illinois v. Allen*, 397 U.S. at 359-360. The judge did not even give the appropriate cautionary instructions in his closing charge to the jury. Appendix A:6-7; Appendix B:62-69.

The obvious impact of the trial judge's decision was concisely stated in *Illinois v. Allen:*

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use

> of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

397 U.S. at 344. As the district court accurately observed, "[t]hose insistent possibilities of jury prejudice and affront to the dignity and decorum of the judicial proceeding were realized here." Appendix B:67. The attitude of the trial judge, perhaps rooted in his previously articulated displeasure with (indeed, hostility toward) having to abide by applicable constitutional principles as defined by higher courts,[6] further destroyed Mr. Oses' attempts to effectively exercise his Sixth Amendment rights.

C. Sarcastic and prejudicial comments interfered with Mr. Oses' right to represent himself.

The district court found the record "replete with verbal improprieties demeaning the *pro se* defense and identified a half-dozen representative examples. Appendix B:70. The trial judge frequently addressed Mr. Oses in sarcastic and prejudicial terms in front of the jury. The judge also made fun of Mr. Oses' language and suggested that Mr. Oses was "distasteful" to look at. The judge pointedly belittled Mr. Oses' efforts, suggesting to the jurors that they had no interest in Mr. Oses' cross-examination. As the district court observed, "it is apparent that the jury would discount much of what [Mr. Oses] was

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[6] The trial judge's stated attitude toward the appellate precedent protecting the exercise of a defendant's Sixth Amendment right to represent himself is quoted at length in the district court's decision. Appendix B:81-82 n.27 ("I don't know what appellate judges are thinking when they make these rulings.")

saying when the judge was constantly instructing the defendant to shut up." Appendix B:71 n. 24.

Moreover, these comments were made in such a manner as to give the jury the impression that the judge harbored contempt for Mr. Oses, thus improperly eroding Mr. Oses' creditability and the credibility of his defense in front of the jury. Although the Commonwealth has apparently abandoned what the district court found to be its "disingenuous characterizations of [the trial judge's] remarks as 'indecorous,' 'droll,' and 'conversational,' " Appendix B:73-74, the Commonwealth does contend, at least implicitly, that the improper sarcasm and ridicule is justifiable because Mr. Oses had "difficulty" adhering to the rules of evidence and interjected comments during the questioning of witnesses. This, however, can provide absolutely no justification for the ridicule, sarcasm, and contempt to which he was subjected.

As the district court observed, "the repetitive quality and substantive character of [the trial judge's] commentary drove home a clear message to the jury – and indeed all exposed to the trial proceedings: the trial judge was not impartial." Appendix B:77. Such commentary eviscerated Mr. Oses' effort to represent himself before the jury, depriving him of his constitutional rights. As the district court stated, "[f]rom the jury's perspective, the trial judge's actions could only be interpreted as a wholesale judicial rejection of the validity of Oses' *pro se* defense." Appendix B:69-70. Essentially, the district court found that "the trial judge had determined . . . that the manner and substance of [Mr. Oses'] defense was unworthy of either respect or belief." Appendix B:78.

In addition to the repeated improper conduct of the trial judge, Mr. Oses also was subjected to demeaning comments and improper conduct by the prosecutor in front of the jury. The trial judge, plainly insensitive to the effect that such comments had on Mr. Oses' right to represent himself, did nothing (certainly nothing adequate) to stop this conduct. Appendix B:78-80. The frequency of such sarcastic and critical comments inevitably gave the jury the impression that Mr. Oses was dishonest, truculent and dangerous. By unnecessarily maligning him at every opportunity, and engaging in improper and prejudicial melodrama regarding the handling of a gun exhibit, Appendix B:79-80, the prosecutor undermined Mr. Oses' effort to exercise his Sixth Amendment right to represent himself.

It is not enough to say, as the Commonwealth does, that because Mr. Oses was permitted to file motions and question witnesses his Sixth Amendment rights were unimpaired. *See McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). Although the jury may have perceived that Mr. Oses was representing himself to some extent, they also could not help but perceive that the trial judge and the prosecutor ridiculed his efforts, that he was kept in chains, and that when the "lawyers" participated in discussions with the judge at the side bar, Mr. Oses was excluded. The district court correctly concluded that the combined effect of these incidents effectively deprived Mr. Oses of his right to represent himself.

As the district court wrote:

> Provisions for the federal writ of habeas corpus would be hollow if a proceeding such as this trial of the petitioner were permitted to stand.

> When, as here, the trial judge consistently undermines the teachings of *Faretta* by his conduct infects the trial with fundamental unfairness, the writ is required irrespective of the consequences.

Appendix B:102.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting the Court's review, and this Court should deny the petition.

Respectfully submitted,

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